

*United States Court of Appeals  
for the Second Circuit*



**APPENDIX**



ORIGINAL

74-1775

United States Court of Appeals  
FOR THE SECOND CIRCUIT

HUGO STINNES STEEL AND METALS COMPANY,  
(Division of Hugo Stinnes Corporation),

*Plaintiff-Appellant,  
against*

S.S. ELBE OLDENDORFF, her engines, boilers, etc.;  
EGON OLDENDORFF and ATLANTIC SHIPPING  
COMPANY, S.A.,

*Defendants-Appellees.*

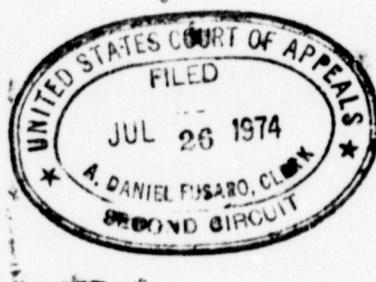
ON APPEAL FROM THE UNITED STATES DISTRICT COURT,  
FOR THE SOUTHERN DISTRICT OF NEW YORK

JOINT APPENDIX

HILL, RIVKINS, CAREY, LOESBERG  
& O'BRIEN  
96 Fulton Street  
New York, N.Y. 10038  
(233-6171)

*of counsel*  
WALKER & EWIG  
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(267-4737)  
*Attorneys for Appellant*

HAIGHT, GARDNER, POOR & HAVENS  
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New York, N.Y. 10004



**PAGINATION AS IN ORIGINAL COPY**

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## DOCKET ENTRIES

HUGO STEINER, STEEL AND METALS, COMPANY, ETC, V.S. S.S. ELM O LDENDORFF, her engines, etc, et-a

81 66.56

Date of  
Judgment:

DATE	PROCEEDINGS
DEC29-71	FILED COMPLAINT. ISSUED SUMMONS.
Jan 19/72	Filed Summons and marshals ret. Served: Atlantic Shipping Co., S.A. by Mr. Soundniera on 1/7/72.
May 21-73	Filed summons with marshal's ret. Served Egon Oldendorff by Mr. Foxx on 5/11/73
Jun. 29-73	Filed pltff's affdvt. and notice of motion Re: Change of Venue
Jun. 29-73	Filed pltff's Memorandum of Law in support of motion for change of venue
Sep-19-73	Filed OPINION #39831 ... Plaintiff's motion to transfer this action to the So. D. of Georgia is denied. - So ordered. -- Metzner, J. (m/n)
25-73	PRE-TRIAL CONFERENCE HELD BY Metzner, J.
Mar-21-74	Filed certificate of mailing of summons and complaint - registered mail #305467 to: Egon Oldendorff 2400 Lubeck 1 Postbox 2135 Funhausen 1, W. Germany
Mar-26-74	Filed order dismissing proceeding for lack of prosecution without prejudice and without costs. -- Metzner, J.
Apr-5-74	PRE-TRIAL CONFERENCE HELD BY Metzner, J.
Apr-4-74	FILED ORDER. Time in which pltff must move pursuant to Rule 59 FRCP is extended to 5 days after pltff's attys have been informed that file has been re-located or the microfilm copy of said order becomes available for inspection, whichever first occurs.
Apr-9-74	Filed pltf's' affdvt. and notice of motion for an order vacating final judgment - ret. 4-18-74
Apr-9-74	Filed pltf's memorandum of law in support of motion to vacate final order
Apr-15-74	Filed deft's affdvt. of LeRoy S. Corsa in response to pltf's motion to vacate final order.
Apr-18-74	Filed reply affdvt. of Robert J. Ryniker re motion to vacate.
Apr-18-74	Filed reply affdvt. of Casper F. Ewig re motion to vacate final order
Apr-25-74	Filed plaintiff's notice of appeal to the USCA for the 2nd Circuit from order dismissing complaint. - m/copy to Haight Gardner, Poor & Havens, Esqs.

## SUMMONS

SUMMONS IN A CIVIL ACTION

CIV. IA (2-61)  
(Formerly D.C. Form No. 45a Rev. 6-191)

## United States District Court

FOR THE

SOUTHERN DISTRICT OF NEW YORKCIVIL ACTION FILE NO. 71-CIV-5692HUGO STINNES STEEL AND METALS COMPANY  
(DIVISION OF HUGO STINNES CORPORATION),

SUMMONS

Plaintiff

v.

E.S. ELBE OLDENDORFF, her engines,  
boilers, etc.; EGON OLDENDORFF;  
and ATLANTIC SHIPPING COMPANY, S.A.

Defendant

To the above named Defendant :

You are hereby summoned and required to serve upon

Note:—This summons is issued in accordance with the Federal Rules of Civil Procedure.

HILL RIVKINS WARBURTON MCGOWAN &amp; CAREY

[RENT]

plaintiff's attorney , whose address

RENT  
96 Fulton Street  
New York, New York 10038

*Summons*

an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

-----JOHN B. LIVENGSTON-----  
*John B. Livingston*  
Clerk of Court.  
-----  
Deputy Clerk.

Date: December 25, 1971

[Seal of Court]

NOTE:—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

COMPLAINT

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

..... X  
HUGO STINNES STEEL AND METALS  
COMPANY (DIVISION OF HUGO STINNES  
CORPORATION),

COMPLAINT

Index No.

Plaintiff,

- against -

S.S. ELBE OLDENDORFF, her engines,  
boilers, etc.; EGON OLDENDORFF  
and ATLANTIC SHIPPING COMPANY, S.A.

Defendants.

..... X

The plaintiff herein, by its  
attorneys, Hill, Pivkins, Warburton, McCowan and Carey,  
complaining of the above named vessel and defendants,  
alleges upon information and belief:

FIRST: This is an admiralty or  
maritime claim within the meaning of Rule 9(h) of the  
Rules of Civil Procedure.

SECOND: At and during all the  
times hereinafter mentioned, plaintiff had and now has  
the legal status and principal office and place of business  
stated in Schedule A hereto annexed and by this reference  
made a part hereof.

THIRD: At and during all the times

# A 5

## *Complaint*

hereinafter mentioned, defendants had and now have the legal status and offices and places of business stated in Schedule A, and were and now are engaged in business as common carriers of merchandise by water for hire, and owned, operated, managed, chartered and controlled the above named vessel which now is or will be within the jurisdiction of this Court during the pendency of this action.

FOURTH: On or about the date and at the port of shipment stated in Schedule A, there was delivered to the vessel and defendants in good order and condition the shipment described in Schedule A, which the said vessel and defendants received, accepted and agreed to transport for certain consideration to the port of destination stated in Schedule A.

FIFTH: Thereafter, the said vessel arrived at the port of destination described in Schedule A, where the cargo was delivered short and/or otherwise damaged.

SIXTH: By reason of the premises, the above named vessel and defendants breached, failed and violated their duties and obligations as common carriers and were otherwise at fault.

SEVENTH: Plaintiff was the shipper,

*Complaint*

consignee or owner of the shipment as described in Schedule A, and brings this action on its own behalf and, as agent and trustee, on behalf of and for the interest of all parties who may be or become interested in the said shipment, as their respective interests may ultimately appear, and plaintiff is entitled to maintain this action.

WHEREFORE Plaintiff has duly performed all duties and obligations on its part to be performed.

WHEREFORE By reason of the premises, plaintiff has sustained damages as nearly as same can now be estimated, no part of which has been paid, although duly demanded, in the amount of \$45,159.86.

WHEREFORE, plaintiff prays:

1. That process in due form of law according to the practice of this Court may issue against defendants.

2. That if defendants cannot be found within this District, that all of their property within this District, as shall be described in the affidavit attached hereto, be attached in the sum set forth in this complaint, with interest and costs.

3. That a decree may be entered in favor of plaintiff against defendants for the amount of plaintiff's damages, together with interest and costs.

*Complaint*

4. That process in due form of law according to the practice of this Court may issue against the aforesaid named vessel.

5. Plaintiff further prays for such other, further and different relief as to this Court may seem just and proper in the premises.

HILL, RIVKINS, MARBURGH  
McGOWAN & CIRILY  
Attorneys for Plaintiff

By: \_\_\_\_\_ Member of the Firm  
(Verified)

## Complaint

SCHEDULE A

Plaintiff's legal status and principal office and place of business:

HUGO STINNES STEEL AND METALS COMPANY, (DIVISION OF HUGO STINNES CORPORATION), was and now is a corporation and/or other business entity duly organized and existing under and by virtue of the laws of one of the states of the United States with an office and place of business at 750 Third Avenue, New York, New York.

Defendants' legal status and principal office and place of business:

EGON OLDENDORFF was and now is a corporation, partnership, and/or other business entity duly organized and existing under and by virtue of the laws of the Federal Republic of West Germany with an office and place of business at Funfhausen 1 Lubeck, Germany.

ATLANTIC SHIPPING COMPANY, S.A. was and now is a corporation duly organized and existing under and by virtue of the laws of the Republic of Panama with an office and place of business c/o Shipping Agencies, Inc. 52 Broadway, New York, New York.

DATE OF SHIPMENT:	On or about December 15, 1970
PORT OF SHIPMENT:	Antwerp
PORT OF DISCHARGE:	Savannah
SHIPPER:	Agence Maritime Transoceanique
CONSIGNEE:	Order
NOTIFY:	Stinnes Steel and Metals Co.
DESCRIPTION OF SHIPMENT:	54 coils galvanized steel, as more particularly described in B/L 50 dated December 15, 1970.
NATURE OF LOSS OR DAMAGE:	Water damage
AMOUNT:	\$45,159.86

MARSHALL'S RETURN, JANUARY 7, 1972

83086

RECEIVE. MAIL JAN 14 1972

<b>U.S. MARSHALS SERVICE INSTRUCTION AND PROCESS RECORD</b>		INSTRUCTIONS: See "INSTRUCTIONS FOR SERVICE OF PROCESS BY THE U.S. MARSHAL" on the reverse of the last (No. 5) copy of this form. Please type or print legibly, insuring readability of all copies. Do not detach any copies.			
PLAINTIFF HUGO STINNES STEEL AND METALS COMPANY		COURT NUMBER 71 Civ 3692			
DEFENDANT ATLANTIC SHIPPING COMPANY, S.A.		TYPE OF WRIT S & C			
SERVE → AT	NAME OF INDIVIDUAL, COMPANY, CORPORATION, ETC., TO SERVE OR DESCRIPTION OF PROPERTY TO SEIZE OR CONDEMN ATLANTIC SHIPPING COMPANY, S.A.				
	ADDRESS (Street or P.O. Box, Apartment No., City, State and ZIP Code) c/o KERSTEN SHIPPING AGENCY INC. 52 Broadway, New York, New York				
SEND NOTICE OF SERVICE COPY TO NAME AND ADDRESS BELOW:		Show number of this writ and total number of writs submitted, i.e., 1 of 1, 1 of 3, etc. → NO. 1 TOTAL 1 1			
Hill, Rivkins, Warburton, McGowan & Carey 96 Fulton Street New York, New York		CHECK IF APPLICABLE: <input type="checkbox"/> One copy for U. S. Attorney or designee and two copies for Attorney General of the U. S. included.			
SHOW IN THE SPACE BELOW AND TO THE LEFT ANY SPECIAL INSTRUCTIONS OR OTHER INFORMATION PERTINENT TO SERVING THE WRIT DESCRIBED ABOVE.					
SPECIAL INSTRUCTIONS:					
NAME AND SIGNATURE OF ATTORNEY OR OTHER ORIGINATOR John H. F. ...			TELEPHONE NUMBER 73-6171		DATE 1/17/72
SPACE BELOW FOR USE OF U.S. MARSHAL ONLY - DO NOT WRITE BELOW THIS LINE					
Show amount of deposit (or applicable code) and sign USM-385 for first writ only if more than one writ submitted.		DEPOSIT/CODE →	DIST. OF ORIGIN 54	DISTRICT TO SERVE 50	LOCATION OF SUB-OFFICE OF DIST. TO SERVE
I acknowledge receipt for the total number of writs indicated and for the deposit (if applicable) shown.		SIGNATURE OF AUTHORIZED USMS DEPUTY OR CLERK John Bryan			DATE 1/17/72
<input checked="" type="checkbox"/> I hereby certify and return that I have personally served, have legal evidence of service, or have executed as shown in "REMARKS," the writ described on the individual, company, corporation, etc., at the address shown above or on the individual, company, corporation, etc., at the address inserted below.					
<input type="checkbox"/> I hereby certify and return that, after diligent investigation, I am unable to locate the individual, company, corporation, etc., named above within this Judicial District.					
NAME AND TITLE OF INDIVIDUAL SERVED (If not shown above): John Bryan over 17 years old - not agt.			<input type="checkbox"/> A person of suitable age and discretion then abiding in the defendant's usual place of abode.		
ADDRESS (Complete only if different than shown above)			FEE (If applicable) \$ 2.00		MILEAGE \$
DATE(S) OF ENDEAVOR (Use Remarks if necessary)		DATE OF SERVICE 1-7-72	TIME 12 PM	SIGNATURE OF U. S. MARSHAL OR DEPUTY John Bryan	

## REMARKS

ALL Processes Accounted For  
 Initial Deposit: .....3.36.....  
 Cost for Service: .....3.72.....  
 Balance Due: .....1.36.....

Please make remittance payable  
 to U. S. Marshal, SDNY, U. S.  
 Courthouse, Foley Sq., New York,  
 NY, 10007.

MARSHALL'S RETURN, MAY 11, 1973

RECEIVED BY MAIL MAY 18 1973

83086/RJR

U.S. MARSHALS SERVICE INSTRUCTION AND PROCESS RECORD		INSTRUCTIONS: See "INSTRUCTIONS FOR SERVICE OF PROCESS BY THE U.S. MARSHAL" on the reverse of the last (No. 5) copy of this form. Please type or print legibly, insuring readability of all copies. Do not detach any copies.			
PLAINTIFF <b>HUGO STINNES STEEL AND METALS COMPANY (DIVISION OF HUGO STINNES CORPORATION)</b>		COURT NUMBER <b>71</b>			
DEFENDANT <b>S. E. ELBS OLDENDORFF, her engines, etc., EGON OLDENDORFF and ATLANTIC SHIPPING COMPANY, S.A.</b>		TYPE OF WRIT <b>S/C</b>			
SERVE	NAME OF INDIVIDUAL, COMPANY, CORPORATION, ETC., TO SERVE OR DESCRIPTION OF PROPERTY TO SEIZE OR CONDEMN				
→	EGON OLDENDORFF 676 STEVENSON - KARR & CO., INC. 29 Broadway, New York 10006				
ADDRESS (Street, City, State, Apartment No., Office, Room, and ZIP Code)		Show number of this writ and total number of writs served Ex. Ls. 1 of 1, 1 of 2, etc. →			
At		No. 1 of 1, 1 of 1, etc. →			
SEND NOTICE OF SERVICE COPY TO NAME AND ADDRESS BELOW:		NO. 1 of 1, 1 of 1, etc. →			
		83086-MRM/RJR			
HILL, RIVKINS, WARBURTON, MCGOWAN & CAREY 96 Fulton Street New York, New York 10038		CHECK IF APPLICABLE: One copy for U. S. Attorney or designee and two copies for Attorney General of the U. S. Included.			
		SHOW IN THE SPACE BELOW AND TO THE LEFT ANY SPECIAL INSTRUCTIONS OR OTHER INFORMATION PERTINENT TO SERVING THE WRIT DESCRIBED ABOVE			
SPECIAL INSTRUCTIONS:					
NAME AND SIGNATURE OF ATTORNEY OR OTHER ORIGINATOR <i>Peter J. Vitello</i>			TELEPHONE NUMBER 233-6171		DATE 5/10/73
SPACE BELOW FOR USE OF U.S. MARSHAL ONLY - DO NOT WRITE BELOW THIS LINE					
Show amount of deposit (or applicable code) and sign UEM-265 for first writ only if more than one writ submitted. I acknowledge receipt for the total number of writs indicated and for the deposit (if appli- cable) shown.		DEPOSIT/CODE →	DIST. OF ORIGIN 34	DISTRICT TO SERVE 7	LOCATION OF SUB-OFFICE OF DIST. TO SERVE
		SIGNATURE OF AUTHORIZED USMS DEPUTY OR CLERK <i>7370 (Chen)</i>			DATE 5/15/73
<input checked="" type="checkbox"/> I hereby certify and return that I have personally served, have legal evidence of service, or have executed as shown in "REMARKS," the writ described on the individual, company, corporation, etc., at the address shown above or on the individual, company, corporation, etc., at the address inserted below.					
<input type="checkbox"/> I hereby certify and return that, after diligent investigation, I am unable to locate the individual, company, corporation, etc., named above within this Judicial District.					
NAME AND TITLE OF INDIVIDUAL SERVED (If not shown above) <i>Timothy J. Vitello</i>					
ADDRESS (Complete only if different than shown above)					
DATE(S) OF ENDEAVOR (Use Remarks if necessary)		DATE OF SERVICE TIME 5-11-73	AM PM	SIGNATURE OF U.S. MARSHAL OR DEPUTY <i>John J. Vitello</i>	
REMARKS					

*er*  
All Processes Accounted For  
Initial Deposit: .....  
Cost for Service: .....  
Balance Due: ..... *3 35*

Please make remittance payable  
to U. S. Marshal, SDNY, U. S.  
Courthouse, Foley Sq., New York,  
NY, 10007

## MOTION FOR CHANGE OF VENUE

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
HUGO STINNES STEEL AND METALS COMPANY : MOTION FOR  
(DIVISION OF HUGO STINNES CORPORATION), : CHANGE OF VENUE

Plaintiff : 71 Civ. 5692  
- against - :

S.S. ELBE OLDENDORFF, her engines,  
boilers, etc.; EGON OLDENDORFF, and  
ATLANTIC SHIPPING COMPANY, S.A., :

Defendants :

-----X  
Plaintiff moves the court to transfer this action  
to the Southern District of Georgia, Savannah Division pur-  
suant to the provisions of Section 1404, Title 28(a), United  
States Code for the convenience of parties and witnesses, in  
the interest of justice, in that, as more clearly appears  
in the affidavit of Robert J. Ryniker annexed hereto as  
Exhibit A,

(a) This is an action against the S.S. EIBE OLDEM-  
DORFF in rem and EGON OLDENDORFF and ATLANTIC SHIPPING COM-  
PANY, S.A., in personam, for damage to cargo carried aboard  
the S.S. EIBE OLDEMORFF. The shipment moved from Antwerp  
to Savannah, Georgia and was discharged from the vessel in  
Savannah. Plaintiff has been unable to secure service of  
process over either defendant in personam since plaintiff  
has been unable to locate an office or place of business  
within this district. Service on Atlantic was made under

*Motion for Change of Venue*

protest on an alleged agent but returned since the agency had terminated.

Nor has plaintiff been able to secure service on the vessel in rem because, to the best of plaintiff's knowledge, the vessel has not called within this district since the institution of this action.

Plaintiff will be able to secure service of process on both defendants pursuant to the "long-arm" or substituted service statutes of the State of Georgia since that was the place of discharge. In fact, personal service is probably possible as to both defendants since both presumably had agents within that district to deal with the discharging and delivery of cargo in Savannah.

(b) This action would be barred by the one year statute of limitation provision in the Carriage of Goods by Sea Act, 46 U. S. C. A. 1300 et seq. were it necessary to commence a new action there.

(c) The cargo surveyors and inspectors who dealt with this matter are located in Savannah since that was the discharge port.

WHEREFORE, plaintiff respectfully prays that this court order that this action be transferred to the Southern District of Georgia, Savannah Division.

Dated; New York, New York  
June 27th, 1973.

HILL, RIVKINS, McGOWAN & CAREY  
Attorneys for Plaintiff  
Office and P. O. Address  
96 Fulton Street  
New York, New York 10038

AFFIDAVIT OF ROBERT J. RYNIKER IN SUPPORT OF MOTION

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
HUGO STINNES STEEL AND METAL COMPANY  
(DIVISION OF HUGO STINNES CORPORATION), : 71 Civ. 5692

Plaintiff :

- against - : AFFIDAVIT IN  
S.S. EIBE OLDENDORFF, her engines, SUPPORT OF  
boilers, etc.; EGON OLDENDORFF, and MOTION FOR  
ATLANTIC SHIPPING COMPANY, S.A., : CHANGE OF VENUE

Defendants :

-----X  
STATE OF NEW YORK } ss.:  
COUNTY OF NEW YORK }

ROBERT J. RYNIKER, being duly sworn deposes and  
says:

I am an attorney at law associated with the firm  
of HILL, RIVKINS, McGOWAN & CAREY, attorneys for plaintiff  
herein, and make this affidavit in support of plaintiff's  
motion for change of venue from the Southern District of  
New York to the Southern District of Georgia, Savannah Div-  
ision.

This is an action against the S.S. EIBE OLDENDORFF  
in rem and EGON OLDENDORFF and ATLANTIC SHIPPING COMPANY, S.A.  
in personam, for damage to a cargo of steel coils carried  
aboard the S.S. EIBE OLDENDORFF. The shipment moved from  
Antwerp to Savannah, Georgia and was discharged from the  
vessel in Savannah. Plaintiff has been unable to secure  
service of process over either defendant in personam since

*Affidavit of Robert J. Ryniker in Support of Motion*

plaintiff has been unable to locate an office or place of business within this district. Service of process on Atlantic was made under protest on an alleged agent but returned since the agency had terminated.

Plaintiff has also been unable to secure service on the vessel in rem because, to the best of plaintiff's knowledge, the vessel has not called within this district since the institution of this action.

Service of process on both defendants will be possible pursuant to the "long-arm" or substituted service statutes of the State of Georgia since that was the place of discharge and personal service may be possible since presumably defendants had agents within that district to deal with the discharging and delivery of cargo in Savannah.

This action would be barred by the one-year statute of limitation provision in the Carriage of Goods by Sea Act, 46 U.S.C.A. 1300 et. seq. were it necessary to commence a new action there.

The cargo was surveyed in Savannah since that was the discharge port and these surveyors are presently in Savannah.

---

Robert J. Ryniker

Sworn to before me  
this day of June, 1973.

---

Notary Public

OPINION OF METZNER, D.J. ON MOTION FOR CHANGE OF VENUE

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

----- x

HUGO STINNES STEEL AND METALS COMPANY :  
(DIVISION OF HUGO STINNES CORPORATION),

Plaintiff,

-against-

S.S. ELBE OLDENDORFF, her engines,  
boilers, etc.; EGON OLDENDORFF, and  
ATLANTIC SHIPPING COMPANY, S.A.,

71 Civ. 5692  
# 39834

Defendants.

----- x

A P P E A R A N C E S

Hill, Rivkins, McGowan & Carey  
Attorneys for Plaintiff  
96 Fulton Street  
New York, N. Y. 10038

FILED  
U.S. DISTRICT COURT  
SER 19 4 23 PM '73  
G

METZNER, D. J.:

Plaintiff moves pursuant to 28 U.S.C. § 1404(a)  
to transfer this action to the Southern District of  
Georgia, Savannah Division.

Section 1404(a) provides that a civil action  
may be transferred "for the convenience of parties and

*Opinion of Metzner, D.J. on Motion for Change of Venue*

witnesses, in the interest of justice, . . ."

The complaint in this action was filed on December 29, 1971, shortly before the running of the one-year statute of limitations under COGSA (46 U.S.C.S 1303(6) (1970)). Although nearly two years have gone by, no one has been served in this action. The obvious object of the motion is to keep the action alive under the original date of filing.

The affidavit submitted in support of the motion states that service of process on the defendants will be possible under the long arm statutes of Georgia, since that was the place of discharge of the cargo. Furthermore, personal service might be possible since, presumably, agents were present in that district to deal with the discharge. The affidavit goes on to state that the cargo surveyors and inspectors who dealt with this matter are located in Savannah, Georgia.

In any event, a new action cannot be instituted in Georgia at this time because the statute of limitations has long since run.

Normally, Section 1404(a) is availed of by defendants by way of a motion in which the plaintiff's

*Opinion of Metzner, D.J. on Motion for Change of Venue*

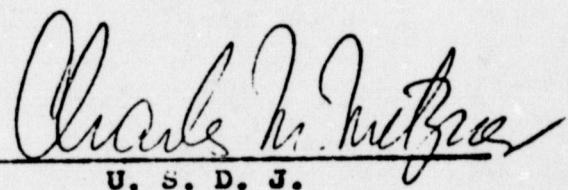
choice of forum is given great weight. We have no defendants here since none have been served.

It appears to me that Section 1404(a) was not intended to be used to bail out a plaintiff in circumstances such as are present here. The "interest of justice" is not served in subjecting parties to the defense of a stale claim. The whole purpose of the statute of limitations would be negated if this motion were granted. The holding in Goldlawr, Inc. v. Heiman, 369 U.S. 463 (1962), is not applicable here. In that case service, albeit ineffective, was made on the defendants prior to the running of the statute of limitations. The statute ran during the prolonged proceedings, in which the defendants were engaged, to avoid suit.

The motion is denied.

So ordered.

Dated: New York, N.Y.  
September 19, 1973

  
U. S. D. J.

**AFFIDAVIT OF CASPAR F. EWIG IN SUPPORT OF PLAINTIFF'S  
MOTION UNDER RULE 60(b)**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X

HUGO STINNES STEEL AND METALS COMPANY  
(DIVISION OF HUGO STINNES CORPORATION),

Plaintiff,

**AFFIDAVIT**

- against -

Index No. 71 Civ. 5692

S.S. ELBE OLDENDORFF, her engines,  
boilers, etc.; EGON OLDENDORFF,  
and ATLANTIC SHIPPING COMPANY, S.A.,

Defendants.

-----X

STATE OF NEW YORK )  
: ss.:  
COUNTY OF NEW YORK)

CASPAR F. EWIG, being duly sworn, deposes and says:

I am an attorney and a member of WALKER & EWIG. Until  
March 31, 1972, I was an associate of HILL, RIVKINS, WARBURTON,  
MCGOWAN & CAREY (now HILL, RIVKINS, CAREY, LOESBERG & O'BRIEN)  
attorneys for plaintiff.

I make this affidavit in support of plaintiff's motion  
for an order pursuant to Rule 60(b) of the Federal Rules of  
Civil Procedure, relieving plaintiff from a final judgment and  
order of dismissal entered on March 26, 1974 pursuant to General  
Rule 23 of the General Rules for the Southern District of New  
York.

*Affidavit of Caspar F. Ewig in Support of Plaintiff's Motion Under Rule 60(b)*

Your deponent, acting of counsel to plaintiff's attorneys, attended a Special Review Calendar hearing on March 25, 1974 before this Court since your deponent was familiar with the handling of this case from its inception until his departure from the law firm representing plaintiff.

At the March 25th hearing, your deponent requested that the Court continue the case, reconsider its denial of plaintiffs motion to transfer the action to Savannah or, in the alternative, enter a default judgment against Atlantic Shipping Company, S.A. (hereinafter referred to as "Atlantic" and "charterer's"). The Court denied all the applications, and dismissed the complaint for lack of prosecution. The dismissal order makes no reference to plaintiffs application for a default judgment against the defendant Atlantic. A copy of the order annexed hereto as Exhibit A.

It is respectfully submitted that a history of this litigation does not warrant a dismissal for lack of prosecution and that such dismissal was entered due to inadvertence and excusable neglect and should be vacated.

The summons and complaint herein were filed on December 29, 1971 against the vessel, Egon Oldendorff (hereinafter referred to as "Oldendorff" and "owners") and against Atlantic Shipping Company, S.A. as charterer. Service of process

*Affidavit of Caspar F. Ewig in Support of Plaintiff's  
Motion Under Rule 60(b)*

on Atlantic was delivered to the U.S. Marshal on the same date, but due to an improper designation of Atlantic's agent, process was returned unserved on January 4, 1972. On January 6, 1972 a corrected instruction sheet with the proper addressee was delivered to the Marshal and service was completed against Atlantic on January 7, 1972. Service was accepted over protest by Kersten Shipping Agency Inc., although your deponent had served Atlantic Shipping through Kersten previously as well as subsequently. In fact, on or about April 20, 1972 your deponent caused the Marshal to serve Atlantic through its agent Kersten in a case bearing Index No. 72 Civ. 1647-H.R.T. (closed) and Atlantic Shipping duly filed an answer therein. Additionally, Kersten Shipping Agency Inc. is listed as defendant Atlantic's general agent in New York on the reverse side of the bill of lading herein involved (see Exhibit B annexed hereto).

On January 4, 1972, a copy of the summons and complaint was mailed to defendant Oldendorff and receipt thereof was duly acknowledged in Oldendorff's letter of January 19, 1972 (see Exhibits C and D annexed hereto). In this correspondence your deponent requested Oldendorff to appear voluntarily so as to avoid the necessities of attachment either in rem or pursuant to Rule B-2 of the Supplemental Rules of the Federal Rules of Civil Procedure. Defendant's response was to threaten the attachment

*Affidavit of Caspar F. Ewig in Support of Plaintiff's Motion Under Rule 60(b)*

of plaintiff's assets in Germany in the event the jurisdictional attachment was used.

Again your deponent wrote both owners and charterers on March 15 and 16 respectively requesting an appearance and advising charterers of our intention to apply for a default in the event no response was forthcoming. (See Exhibits E and F annexed hereto).

Charterer's agent responded on March 22 reiterating its protest but forwarded a copy of the summons and complaint to charterer's agent in Houston (see Exhibit G annexed hereto). Owners responded by letter of March 27, 1972 advising that the gentleman handling the case was presently out of the office and would respond upon his return, but he failed to do so.

Upon deponent's departure from Hill, Rivkins, the file was transferred to a partner for further handling and, it was reassigned to an associate, Mr. Ryniker. Through a clerical error the case appeared on neither attorneys' diary. (See Ryniker affidavit filed herewith). Consequently, the case remained inactive from April 1, 1972 until May of 1973 when plaintiff's attorneys became aware of this situation through an inquiry by the client.

After the inquiry the Marshal was instructed to re-reserve Atlantic Shipping, c/o Kersten and a telex was sent to owners.

*Affidavit of Caspar F. Ewig in Support of Plaintiff's Motion Under Rule 60(b)*

Additionally, plaintiff made a motion to transfer the action pursuant to 28 USC 1404 to the Southern District of Georgia on June 29, 1973. Since motions to transfer cases in a similar posture had been made and granted previously, the affidavit by Mr. Ryniker in support of that motion did not detail all of the prior correspondence and activity preceding the motion and, consequently, this Court denied the motion on the grounds that the claim was "stale".

Immediately after the decision had been entered on September 19, 1973, Mr. Ryniker spoke with an attorney in the firm of Lee and Clark, Savannah, Georgia who advised that it might be possible to continue the action in Savannah despite the denial of the motion to transfer.

An action commenced against all defendants in the State Court of Chatham County, Georgia which was subsequently removed to the federal court upon a petition of Atlantic. Despite proper service, Egon Oldendorff did not appear in the action (see Exhibit H annexed hereto).

The United States District Court for the Southern District of Georgia initially granted a motion by defendant Atlantic to dismiss the action on January 10, 1974 (see Exhibit I annexed hereto) but subsequently amended its order to allow further argument on the question of whether the filing of a

*Affidavit of Caspar F. Ewig in Support of Plaintiff's  
Motion Under Rule 60(b)*

summons and complaint in the Southern District of New York would serve to toll the limitations in the Georgia action. (See Exhibit J annexed hereto).

While plaintiff was engaged in these proceedings in Georgia, a notice setting the matter for a special calendar call conference in New York was received on January 11, 1974. At that conference plaintiff requested an additional sixty days to attempt a further resolution of the litigation.

Shortly after this conference, Mr. Ryniker contacted your deponent to advise of these developments and your deponent immediately suggested dispatching a telex to Atlantic advising that a default judgment would be entered against them in light of their failure to respond. In answer to this telex, and for the first time in this litigation, both your deponent and Mr. Ryniker were contacted by Mr. Leroy Corsa of Haight, Gardner, Poor & Havens, as attorneys representing Atlantic. Furthermore, owners were served pursuant to FRCP, Rule 4(i) and again refused to appear as can be seen from Exhibit K.

Thereafter extended discussions ensued between Mr. Corsa and your deponent and in furtherance of settlement all proceedings, survey reports in support of plaintiff's claim were forwarded to Mr. Corsa of Haight, Gardner.

It was agreed between your deponent and Mr. Corsa that

*Affidavit of Caspar F. Ewig in Support of Plaintiff's Motion Under Rule 60(b)*

he would attend the March 25th conference so as to place this new development before the Court. It was further agreed that plaintiff would not undertake any application for a default judgment against charterers pending the Court's determination of whether it would continue the case in the Southern District of New York and reconsider (in light of charterer's agreement) its denial of an order to transfer the litigation to the Southern District of Georgia.

Unfortunately, none of these alternatives could be explored at the hearing on March 25th since this Court would only consider the alternatives of "settle or dismiss". Thereupon, your deponent made an oral application to enter a default against Atlantic Shipping but was again told to "settle or dismiss" and the application for a default was denied.

Prior to this hearing, Chief Judge Lawrence of the Southern District of Georgia had dismissed plaintiff's complaint as being time barred on the grounds that the denial of transfer pursuant to 28 U.S.C.A. 1404 precluded plaintiff from contending that the statute of limitations had been tolled by the filing of the New York action. Needless to say, plaintiff was unable to induce the charterer to voluntarily settle at that point.

Rather than being dilatory, plaintiff herein actively pursued this litigation after the initial clerical error had been

*Affidavit of Caspar F. Ewig in Support of Plaintiff's  
Motion Under Rule 60(b)*

discovered. After the denial of the motion to transfer plaintiff continued to actively pursue its claim by proceeding in the Southern District of Georgia.

Both the owners and the charterers knew of the pendency of the action from the outset and relied on silence as a defense. Since their very silence was a cause for the delay, and denial of transfer, plaintiff ought not now be dismissed by reason of a clerical error which caused no prejudice to the defendants.

It is respectfully submitted that the alternative of "settle or dismiss" was non-existent where, as here, the defendants could rely on a dismissal in both jurisdictions without having to go to trial on the merits. Where a defendant can be guaranteed a dismissal, what is to induce him to settle?

Plaintiff did all it could under the circumstances to comply with this Court's directive of January 24, 1974 and plaintiff's cause should not have been dismissed for lack of prosecution.

WHEREFORE, your deponent requests that its motion to vacate the final judgment of March 26, 1974 be in all respects granted.

Sworn to before me this

day of April, 1974.

---

CASPAR F. EWIG

---

EXHIBIT A--ORDER OF DISMISSAL ANNEXED TO  
AFFIDAVIT OF CASPAR F. EWIG

RECEIVED  
FEB 26 1974  
MAR 26 1974

S. D. OF N.Y.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

\*\*\*\*\*  
STINNIS

77-cv-5692  
DOCKET #

5/s ELBRE

\*\*\*\*\*  
The above entitled cause having been called on a  
Special Review Calendar MAR. 26, 1974, under General Rule 23  
of this Court, and for cause shown, it is now ORDERED  
that the above entitled cause be dismissed for lack of prosecution,  
under said Rule, without prejudice and without costs.

Dated: New York, N.Y.

MAR. 26, 1974

U.S.D.J.

MR. J. B. COHEN

EXHIBIT B--REVERSE SIDE OF BILL OF LADING ANNEXED  
TO AFFIDAVIT OF CASPAR F. EWIG

ANTWERPEN :	AGENCE MARITIME TRANSOCEANIQUE N.V., 33, Brouwersvliet - B-2000 Antwerpen
HAMBURG :	REINHOLD BANGE, 10, Kaiserswerth - Hamburg 11
CAEN (France) :	SOGENA, B.P. 30 - 14-C
MONTRÉAL, P.Q. :	MARCH SHIPPING, 40, King Street West, Montreal 126, P.Q. - Canada
CLEVELAND, Ohio :	NORDSHIP AGENT, Inc., 403, Williamson Building, Cleveland, Ohio 44113
TOLEDO, Ohio :	NORDSHIP AGENCY, Inc., Board of Trade Building, Toledo, Ohio 43604
DETROIT, Mich. :	NORDSHIP AGENCIES, Inc., 1514, Book Building, Detroit, Mich. 48225
CHICAGO, Ill. :	NORDSHIP AGENCIES, Inc., One East Wacker Drive, Chicago, Ill. 60601
NEW HAVEN (Conn.) :	NEW HAVEN TERMINAL, INC., P.O. Box 1914 - New Haven, Conn. 06509
NEWARK (N.J.) :	KERSTEN SHIPPING AGENCY, Inc., 52, Broadway, New York, N.Y. 10004
PHILADELPHIA (PA.) :	J.A. McCARTHY, Inc., 700, Lafayette Building, Fifth & Chestnut Streets, Philadelphia
CAMDEN (N.J.) :	J.A. McCARTHY, Inc., 700, Lafayette Building, Fifth & Chestnut Streets, Philadelphia
WILMINGTON (DEL.) :	J.A. McCARTHY, Inc., 703, Lafayette Building, Fifth & Chestnut Streets, Philadelphia
BALTIMORE (MD.) :	LAVINO SHIPPING COMPANY, 32, South Street, Baltimore, MD 21202
NORFOLK (VA.) :	T. PARKER HOST, Inc., Rooster Building, Norfolk, VA 23510
WILMINGTON (NC) :	WILMINGTON SHIPPING COMPANY, P.O. Box 1510, Wilmington, N.C. 28401
CHARLESTON (SC) :	CAROLINA SHIPPING COMPANY, P.O. Box 874, Charleston, S.C. 29402
SAVANNAH (GA) :	STRACHAN SHIPPING COMPANY, P.O. Box 9857, Savannah, GA. 31402
JACKSONVILLE (FLA.) :	STRACHAN SHIPPING COMPANY, P.O. Box 4010, Jacksonville, Fla. 32201
MIAMI (Fla.) :	STRACHAN SHIPPING COMPANY, P.O. Box 2558, Miami, Fla. 33101
Port Everglades(Fla.) :	GULFSTREAM SHIPPING CORP., P.O. Box 13049, Fort Lauderdale, Fla. 33316
TAMPA (FLA.) :	EAST-GULF SHIPPING CORP., P.O. Box 2213, Tampa, Fla. 33601
MOBILE (ALA.) :	EAST WEST SHIPPING AGENCIES, Inc., P.O. Box 2184, Mobile, Ala., 36601
NEW ORLEANS (LA.) :	STRACHAN SHIPPING COMPANY, American Bank Building, New Orleans, La. 70130
HOUSTON (TEX.) :	STATES SHIPPING AGENCY, Inc., 912, World Trade Building, Houston, Tex. 77002

**Cables :** TRANSOCEANIC  
BANGEBROKER  
SOGENA  
MAPSHIP  
NORDSHIP  
NORDSHIP  
NORDSHIP  
NORDSHIP  
HAVENTERIM  
ALLTRAFFIC  
MCCARTHY  
MCCARTHY  
MCCARTHY  
LAVSHIP  
HOST  
WILSHIPCO  
CAROLINE  
STRACHAN  
STRACHAN  
STRACHAN  
GULFSTEV  
EASTGULF  
EASYOCEAN  
STRACHAN  
STATESHIP



EXHIBIT C--LETTER DATED JANUARY 4, 1972 ANNEXED TO  
AFFIDAVIT OF CASPAR F. EWIG

January 4, 1972

Messrs. Egon Oldendorff  
Fuhnenhausen 1  
Lubeck, Germany

Re: SS EINE OLDENDORFF  
B/L 50 Antwerp/Savannah  
Our File: 83085

Gentlemen:

We refer to the captioned matter and to your letter of November 8 addressed to Messrs. Carl F. Brig Inc. We cannot agree with the statements made in that letter and, consequently, have placed this matter into suit. From the enclosed copy of the summons and complaint you will note that we have named the vessel, her owners and Atlantic Shipping Company S.A. Service has been effected against Atlantic and we expect to have their response in the very near future.

We extend this opportunity to you to voluntarily appear and answer the complaint in the Southern District of New York. We shall not take any action until the end of this month so as to give you an opportunity to appoint attorneys to represent you. If we do not hear from you prior to that time, we shall have no alternative but to obtain jurisdiction through the legal procedures of attachment.

Very truly yours,

HILL, RIVKINS, WARBURTON, MCGOWAN & CAREY

Caspar F. Ewig

CPE:GL

EXHIBIT D--LETTER DATED JANUARY 19, 1972 ANNEXED  
TO AFFIDAVIT OF CASPAR F. EWIG



# EGON OLDENDORFF

SHIP OWNERS AND SHIP BROKERS

Egon Oldendorff, 2400 Lübeck 1, Postbox 2135

Messrs.  
Hill, Rivkins, Warburton, McGowan  
& Carey  
Attn. Mr. Caspar F. Ewig  
96 Fulton Street  
At William  
New York, N.Y. 10038 /USA

M/S <b>Eckert Oldendorff</b>	abt. 67 000 T.d.w.
M/S <b>Emmo Oldendorff</b>	abt. 67 000 T.d.w.
M/S <b>Bernhard Oldendorff</b>	abt. 54 190 T.d.w.
M/S <b>Harmen Oldendorff</b>	abt. 54 190 T.d.w.
M/S <b>Tete Oldendorff</b>	abt. 39 100 T.d.w.
M/S <b>Rita Oldendorff</b>	abt. 38 100 T.d.w.
M/S <b>Gerd Oldendorff</b>	abt. 16 200 T.d.w.
M/S <b>June Oldendorff</b>	abt. 16 200 T.d.w.
M/S <b>Elisabeth Oldendorff</b>	abt. 15 200 T.d.w.
M/S <b>Caroline Oldendorff</b>	abt. 15 200 T.d.w.
M/S <b>Maria Oldendorff</b>	abt. 15 200 T.d.w.
M/S <b>Dorthe Oldendorff</b>	abt. 15 000 T.d.w.
M/S <b>Gisela Oldendorff</b>	abt. 7 400 T.d.w.
Charting Agent for:	
M/S <b>Dietrich Oldendorff</b>	abt. 38 200 T.d.w.
M/S <b>Regina Oldendorff</b>	abt. 37 700 T.d.w.
M/S <b>Hejena Oldendorff</b>	abt. 37 500 T.d.w.
M/S <b>Hennig Oldendorff</b>	abt. 34 100 T.d.w.
M/S <b>Christiane Oldendorff</b>	abt. 33 900 T.d.w.
M/S <b>Birte Oldendorff</b>	abt. 16 400 T.d.w.
M/S <b>Heila Oldendorff</b>	abt. 16 400 T.d.w.
M/S <b>Johanna Oldendorff</b>	abt. 16 250 T.d.w.
M/S <b>Madda Maria Oldendorff</b>	abt. 15 900 T.d.w.
M/S <b>Klaus Oldendorff</b>	abt. 15 300 T.d.w.
M/S <b>Catherine Oldendorff</b>	abt. 13 400 T.d.w.
M/S <b>Eiba Oldendorff</b>	abt. 11 200 T.d.w.
M/S <b>Heinrich Oldendorff</b>	abt. 11 200 T.d.w.
M/S <b>Christiane Oldendorff</b>	abt. 4 400 T.d.w.
M/S <b>Hans Oldendorff</b>	abt. 4 400 T.d.w.
M/S <b>Erna Oldendorff</b>	abt. 4 400 T.d.w.
M/S <b>Jobst Oldendorff</b>	abt. 4 400 T.d.w.
Newbuildings:	
2 Bulkcarrier	abt. 75 000 T.d.w.
3 Motorships	abt. 15/16 000 T.d.w.

2400 LUBECK 1. 19th Jan., 1972  
Fünhausen 1 He/Ra

MV "Eibe Oldendorff" - B/L 50  
Antwerp/Savannah  
Your File: 83086

Dear Mr. Ewig,

I still have to acknowledge receipt of your letter dated January 4th with enclosed complaint you have raised against the vessel, my firm as well as her former timecharterers, Atlantic Shipping Company. I furthermore noted that service has been effected against Atlantic and that you ask me to appear voluntarily before the Court.

As in my opinion your alleged claim is completely unjustified as already told Messrs. Carl F. Ewig Inc. much to my regret I am not prepared to follow your wish. Therefore, if you deem it necessary you should arrange that as usual the complaint is sent to me on the official way. After a proper Service to my firm has been effected my New York attorneys will look after the matter.

Should you, however, decide to arrest the MV "Eibe Oldendorff", you should keep in mind that the vessel meantime has been sold to Liberia, and consequently I am not the owner of the vessel. Should you decide to arrest other property, I will instruct my attorneys to arrest property of Hugo Stinnes Corp. in Germany, and I have already instructed them to make the necessary investigations.

Once again I must repeat that your claim is completely unjustified. I had asked Messrs. Carl F. Ewig Inc. with my letter of November 8th, 1971 for production of clear evidence and especially to send me a copy of surveyor Charles T. Theus' report who allegedly was present at the time of the discharge. The only action they have taken, is filing the complaint, and this rather clearly shows that the report of Mr. Theus is not in favour of plaintiffs. A

Very truly yours,  
ECON OLDENDORFF EPA.

Telegram: NOADBEARER • Telephone: 212-555-1212 • FAX: 212-555-1212 • Email: [info@noadbearers.com](mailto:info@noadbearers.com)

EXHIBIT E--LETTER DATED MARCH 15, 1972 ANNEXED TO  
AFFIDAVIT OF CASPAR F. EWIG

March 15, 1972

Egon Oldendorff  
2400 Lubeck 1  
Postbox 2135  
Lubeck, Germany

RE: MV EIBE OLDENDORFF B/L 50  
Antwerp/Savannah  
Cur File No: 83086-CFE

Gentlemen:

Thank you for your letter of January 19, 1972.

In order to remove any apprehension which you may have had with respect to the contents of the Charles T. Theus report, we are enclosing a copy herewith. After perusing same we trust that you shall alter your opinion as to the unfavorability of the contents of that report. We have advised our client of your threat to attach the property of Hugo Stinnes Corp. but we exercise our statutory right in arresting one of your vessels in order to obtain the jurisdiction which you will not voluntarily concede. It is inconceivable to the undersigned that a firm which derives substantial revenues from the United States will not voluntarily appear if in fact a dispute arises between the consignee and the carrier. However you may personally evaluate the validity of this suit, it does not detract from our right to have a contrary opinion and to have a United States Court be the arbiter between those differences.

In short we trust you will reverse your unfortunate decision which we, in all fairness considered improvidently taken. Looking forward to hearing from you, we remain

Very truly yours,

HILL, RIVKINS, WARBURTON, MCGOWAN & CAREY  
BY:

CASPAR F. EWIG

CFE/cjf  
ENCL.

E -

EXHIBIT F--LETTER DATED MARCH 16, 1972 ANNEXED TO  
AFFIDAVIT OF CASPAR F. EWIG

March 16, 1972

Kersten Shipping Agency Inc.  
52 Broadway  
New York, New York

Attention: Mr. Martin Sipe

RE:Hugo Stinnes Steel And Metals Co.  
(Division of Hugo Stinnes Corp.)  
vs.- SS EIDE CLIMENDORFF, her engines,  
boilers, etc.:ECON CLIMENDORFF and  
ATLANTIC SHIPPING COMPANY, SA.  
INDEX NO: 73 CIV 5692  
OUR FILE NO: 83086-CFE

Gentlemen:

We refer to the captioned file in which a Summons and Complaint were served upon you in January, 1972. To date we have not heard from you and expect that this was an oversight on your part. However, if we do not hear from you within the next ten (10) days we will have no alternative but to proceed with a default judgment.

Very truly yours,

HILL, RIVKINS, WARBURTON, McCOWAN & CAREY  
BY:

CASPAR F. EWIG

CFE/cjf

*F-*

EXHIBIT G--LETTER DATED MARCH 22, 1972 ANNEXED TO  
AFFIDAVIT OF CASPAR F. EWIGTELEPHONE:  
WHITEHALL 4-2900TELEX:  
RCA: 232761 ITT: 420297 WUI: 620394  
TWX: 710-581-2954CABLES:  
KERSTENS NEWYORK

## KERSTEN SHIPPING AGENCY, INC.

SHIPBROKERS — CHARTERING — SHIP AGENTS  
52 BROADWAY

NEW YORK, N. Y. 10004

March 22, 1972

Hill, Rivkins, Warburton, McGowan & Carey  
96 Fulton Street  
New York, New York 10038

MBM

RE: Hugo Stinnes Steel and Metals Co.  
(Division of Hugo Stinnes Corp.)  
vs. S.S. EIBE OLDENDORFF, her engines,  
boilers, etc.; EGON OLDENDORFF and  
ATLANTIC SHIPPING COMPANY SA  
Index # 71 CIV 5692  
Your File #83086-CFE

RECEIVED

MAR 23 1972

HILL, RIVKINS, WARBURTON,  
MCGOWAN & CAREY

Gentlemen:

We refer to your letter of March 16, and wish to advise you that the summons referred to in your letter was served on us as agents for Atlantic Shipping Company S.A. We have not been agents for this company for several years.

As a consequence, we have forwarded the summons to the general agents of Atlantic Shipping Company S.A., who are

States Shipping Agency, Inc.  
World Trade Building  
Houston, Texas 77002,

as we are doing with copy of this letter and yours.

No doubt you will want to take this matter up with them.

Very truly yours,  
KERSTEN SHIPPING AGENCY, INC.

*Herbert Sondheim*  
Herbert Sondheim  
Vice President-Treasurer

HS/bal

cc: States Shipping  
Agency Inc.

F.M.C. 392

- G -

EXHIBIT H--LETTER DATED NOVEMBER 9, 1973 ANNEXED  
TO AFFIDAVIT OF CASPAR F. EWIG

Secretary of State  
Attn. "rn. Sarah Baker

214 State Capitol  
Atlanta 30334, Georgia  
USA

9th Nov., 1973  
llc/Ra

Dear Mrs. Baker,

In the matter of

Hugo Stinnes Steel and Metals )  
Company (Division of Hugo Stinnes )  
Corporation), )

Plaintiff ) Civil Action No. \_\_\_\_\_

vs. )

Egon Oldendorff And Atlantic )  
Shipping Company, S.A. )

Defendants

I have received your letter of November 2nd with enclosed  
complaint and Summons. In reply I have to inform you that  
this cargo had been discharged at Savannah on/or about January  
7th, 1971. The complaint was raised only on November 2nd, 1973  
before the State Court of Chatham County, Savannah, Georgia  
so that limitation has expired long ago. Under these circumstances  
much to my regret I have to raise the objection of limitation.

Please advise me by return of mail whether the summons within  
30 days under these circumstances will be maintained. This,  
of course, would cause me a lot of unnecessary expenses for  
which I must hold the plaintiff responsible.

Your early reply is invited.

Very truly yours,  
ECON OLDENDORFF

ppa. ppa.

gez. Hellmann gez. Giermann

EXHIBIT I--ORDER OF DISMISSAL OF U.S.D.C. S.D. GA.  
ANNEXED TO AFFIDAVIT OF CASPAR F. EWIGIN THE UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF GEORGIA

SAVANNAH DIVISION

U. S. DISTRICT COURT  
Southern District of Ga.  
Filed in cl. 409

JAN 10 1974

Elorce M. Walker  
Deputy Clerk

HUGO STINNES STEEL AND METALS COMPANY (DIVISION OF HUGO STINNES CORPORATION),	)
Plaintiff	)
VS.	)
EGON OLDENDORFF AND ATLANTIC SHIPPING COMPANY S.A.,	)
Defendants	)

CIVIL ACTION NO. 3226

ORDER OF DISMISSAL

The "saving to suitors" clause of the Judiciary Act of 1789 does not save plaintiff from the bar of the one-year statute of limitations for bringing an action under the Carriage of Goods by Sea Act (COGSA).<sup>1</sup>

With the idea of avoiding the limitation in that legislation, Hugo Stinnes Steel and Metals Company filed the present action in the State Court of Chatham County.<sup>2</sup> Cargo damage in the amount of \$45,159.86 is sought in the complaint which alleges that the defendants breached their obligations as common carriers. By bringing suit in the Georgia courts and under Georgia law plaintiff says that it has the benefit of the State's four-year period for bringing actions for damage to property. Not so.

1. 46 U.S.C.A. § 1303(6). The Act of 1789 (now 28 U.S.C.A. § 1333) vested original jurisdiction in federal district courts in admiralty or maritime cases, exclusive of state courts, but "saving to suitors in all cases all other remedies to which they are otherwise entitled".

2. It was removed on the ground of diversity of citizenship under 28 U.S.C.A. § 1332.

*Exhibit I Annexed to Affidavit of Caspar F. Ewig*

The "saving to suitors" clause permits civil actions in maritime causes to be brought in a state court in cases where the common law provides a remedy concurrent to that afforded under the admiralty jurisdiction. While the exception affords a choice of remedies to suitors, admiralty rights and liabilities of the parties are nevertheless to be determined according to principles of maritime law. 2 Am Jur 2d Admiralty § 106; 2 C.J.S. Admiralty §§ 13, 14.

Here the governing admiralty law is found in the Carriage of Goods by Sea Act which was enacted by Congress in 1936. "Every bill of lading which is evidence of a contract for the carriage of goods by sea to or from ports of the United States, in foreign trade shall have effect subject to the provisions of this chapter." 46 U.S.C.A. § 1300. The carrier is "entitled to the rights and immunitics set forth in" section 1303 thereof and it contains the one-year limitation. See § 1302. More than that, the ocean bill of lading in the present case provides that the legislation of the country of destination corresponding to the "Hague Rules" shall apply to the contract. By and large, the Carriage of Goods by Sea Act embodies those Rules as set forth in the Brussels Convention of 1924. See 6A Benedict on Admiralty 869-876.

I quite agree with counsel for the defendant that this case is governed by the decision of the Fifth Circuit in J. B. Effenson Company v. Three Bays Corporation, Ltd., 238 F.2d 611, 615. There an action for cargo damage was brought more than a year after same occurred.

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3. The complaint studiously avoids reference to the bill of lading as such. A copy of the contract of affreightment has been furnished and the Court treats the motion to dismiss as one under Rule 12(b), F.R.C.P.

*Exhibit I Annexed to Affidavit of Caspar F. Ewig*

Plaintiff contended that Florida's five-year limitation for breach of contract applied since the jurisdiction of the federal district court was based on diversity. In upholding dismissal of the action the Court of Appeals said:

"The right which the plaintiff seeks to enforce is a maritime right and is to be governed by the maritime law. Such law is that which the Congress has enacted or the Federal courts, sitting in admiralty or in the exercise of their maritime jurisdiction, have declared and would apply.... To hold that a plaintiff, entitled to elect his forum as between a Federal court, sitting in admiralty, and a court of common law, either state or federal, has a right to elect whether the liability of the defendant shall be determined by the maritime law or by the common law standards of the state would defeat the uniformity which the Constitution requires in such cases. *Chelentis v. Luckenbach S.S. Co.*, 274 U.S. 372, 38 S.Ct. 501, 62 L.Ed. 1171; *Jansson v. Swedish American Line*, *supra*. This is true even though, as in the case before us, jurisdiction is asserted to be on the ground of diversity of citizenship. *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 1954 A.M.C. 1. The maritime principles would prevail even though the action were brought in a state court. *Jansson v. Swedish American Line*, *supra*. They are 'common law remedies' which may be had, where available, but maritime rights which are redressed."

In Singer Hosiery Mills of New York, Inc. et al. v. Cunard White Star, Limited (Mun.Ct., N.Y. City), 102 N.Y.S.2d 762, 765 it was said that "the question of shipments by sea to or from ports of the United States is a matter of Federal regulation, more especially so when the shipment is governed by a bill of lading". The New York State Court held that the one-year limitation in COGSA for bringing an action for damage to goods is "all inclusive" and that "under our Federal law which governs this action, the shipper ... is bound to begin the action for a breach within one year after delivery of the goods or when the goods should have been delivered."

## Exhibit I Annexed to Affidavit of Caspar F. Ewig

The City Court of Savannah (now State Court of Chatham County) has recognized the exclusive application of the Federal law in actions on ocean bills of lading. In The Crispin Company v. J. R. Shipping Company, Ltd. (No. 58,905) the defendant demurred to the petition on the ground that upon its face the action was subject to the Carriage of Goods by Sea Act and that more than a year had elapsed between the date of delivery and the filing of the suit. The Court sustained, without opinion, the general demurrer by an Order dated January 27, 1967.

To permit a shipper to avoid the rights of a carrier under COGSA and under an ocean bill of lading through the expedient of suing in a state court under state law would in many instances nullify a statute enacted pursuant to the admiralty and maritime jurisdiction, intended to be exclusive in the case of bills of lading on shipments to and from the ports of the United States. The Supreme Court said in this connection in Chelentis v. Luckenbach S.S. Company, Incorporated, 247 U.S. 372, 384:

"Plainly, we think, under the saving clause a right sanctioned by the maritime law may be enforced through any appropriate remedy recognized at common law; but we find nothing therein which reveals an intention to give the complaining party an election to determine whether the defendant's liability shall be measured by common-law standards rather than those of the maritime law."

The motion of defendants is granted and the complaint is dismissed.  
This January 10<sup>th</sup>, 1974.

*Alexander A. Lawrence*  
CHIEF JUDGE, UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF GEORGIA

EXHIBIT J--ORDER GRANTING FURTHER ARGUMENT ANNEXED  
TO AFFIDAVIT OF CASPAR F. EWIGUNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF GEORGIA  
SAVANNAH DIVISION

HUGO STINNES STEEL AND METALS )  
COMPANY (DIVISION OF HUGO STINNES )  
CORPORATION), )  
Plaintiff )  
vs. ) CIVIL ACTION NO. 3226  
EGON OLDDENDORFF AND ATLANTIC )  
SHIPPING COMPANY, S.A., )  
Defendants )

ORDER

This cause coming on to be heard upon the Plaintiff's Motion for Leave to file an Amendment to its Complaint herein and for an Order that this cause be heard upon the Plaintiff's Complaint as thus amended, and it appearing that justice requires that Plaintiff's Motion be granted, and the Court being fully advised,

## IT IS ORDERED AS FOLLOWS:

1. The Plaintiff be and it is hereby granted leave to file its Amendment to the Complaint.

2. All Defendants are granted leave to file Amended Answers or Amendments to Answers previously filed provided as to any Defendant not filing under this leave that the Answer heretofore filed stands as the Answer to the Complaint as amended.

3. The Order of January 10, 1974, dismissing the case is withdrawn and the judgment of dismissal is vacated pending further order.

U. S. DISTRICT COURT  
Southern District of Ga.  
Filed in office

M.  
U. S. DISTRICT JUDGE

*Reserve A. Turner*

JAN 30 1974 19

*B. L. Hall*  
Deputy Clerk

EXHIBIT K--LETTER DATED MARCH 25, 1974 ANNEXED TO  
AFFIDAVIT OF CASPAR F. EWIG



# **EGON OLDENDORFF**

**SHIPOWNER AND SHIPBROKER**

Egon Oldendorff, 2400 Lübeck 1, Postbox 2131

Messrs.  
Hill, Rivkins, Warburton, McGown  
& Carey

96 Fulton Street  
At William  
New York, N.Y. 10038  
U.S.A.

MV "Eibe Oldendorff" - B/L 50  
Antwerp/Savannah  
Your File: 83086-CFF LPC

Owner or Chartering Agent for:	
M/S	Eckert Oldendorff"
M/S	Emma Oldendorff"
M/S	Bernhard Oldendorff"
M/S	Harmen Oldendorff"
M/S	Dietrich Oldendorff"
M/S	Tete Oldendorff"
M/S	Rixa Oldendorff"
M/S	Regina Oldendorff"
M/S	Heine Oldendorff"
M/S	Henning Oldendorff"
M/S	Christoffer Oldendorff"
M/S	Birte Oldendorff"
M/S	Heiga Oldendorff"
M/S	Johanna Oldendorff"
M/S	Gerdi Oldendorff"
M/S	Hugo Oldendorff"
M/S	Klaus Oldendorff"
M/S	Elisabeth Oldendorff"
M/S	Caroline Oldendorff"
M/S	Maria Oldendorff"
M/S	Dorthe Oldendorff"
M/S	Innre Oldendorff"
M/S	Hilla Oldendorff"
M/S	Catharine Oldendorff"
M/S	Eibe Oldendorff"
M/S	Hinrich Oldendorff"
M/S	Gebe Oldendorff"
M/S	Christiane Oldendorff"
M/S	Hans Oldendorff"
M/S	Erna Oldendorff"
M/S	Jobst Oldendorff"
Newbuildings:	
2 Bulkcarrier	each
1 Motorship	
	abt. 73 000 T.d.w.
	abt. 16 300 T.d.w.

2400 LÜBECK 1. 25th March 1974  
Fünhausen 1 He/Ra

**Gentlemen,**

Without a letter you have again sent me a copy of the Civil Action File No. 71 Civ 5692 which you already have sent me with your letter of January 4th, 1972. I do not know what this further action means, but have to state that in no case this can be considered as proper service. If there is any explanation from your side please inform me.

From other sources I understand that attorney Ewig has left your office and has opened his own law-office in New York. As he already mentioned in his letter of January 4th, 1972 service has been effected against Atlantic Shipping Company S.A., and as I was told, this matter is now handled by Shipowners Claims Bureau Inc. as P. & I. Club of the vessel's former time-charterers.

Very truly yours,  
EGON OLDENDORFF

Very truly yours,  
EGON OLDENDORFF  
ppa.

AFFIDAVIT OF ROBERT J. RYNIKER IN SUPPORT OF  
PLAINTIFF'S MOTION UNDER RULE 60(b)

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----;  
HUGO STINNES STEEL & METALS COMPANY  
[Division of Hugo Stinnes  
Corporation],

Plaintiff

71 CIV. 5692

-against-

S.C. ELEM OLDENDORFF, her engines,  
boilers, etc., ECON OLDENDORFF and  
ATLANTIC SHIPPING COMPANY, S.A.,

AFFIDAVIT

Defendants

-----;  
STATE OF NEW YORK }  
COUNTY OF NEW YORK } SS:-

ROBERT J. RYNIKER, being duly sworn, deposes and  
says:

I am an associate in the firm of HILL, RIVKINS,  
CAREY, LOESBERG & O'BRIEN, attorneys for plaintiff herein  
and make this affidavit in support of plaintiff's motion  
under Rule 60(b) to relieve plaintiff from the final judg-  
ment entered March 26, 1974 and to reinstate this action.

The matter was handled by Mr. Casper F. Ewig  
from its inception up to March 31, 1972, when Mr. Ewig left  
this firm and entered into partnership with another attorney.  
The case remained in the office of HILL, RIVKINS, CAREY,  
LOESBERG & O'BRIEN. Mr. Ewig reassigned it to one of the  
partners in the office and subsequently it was reassigned  
to the affiant. Through a clerical error the reassignment

*Affidavit of Robert J. Ryniker in Support of  
Plaintiff's Motion Under Rule 60(b)*

was not communicated nor was affiant aware of the pending matter until some time in May, 1973 when a request was received from the client inquiring as to its status. The inactive period resulted solely from this clerical or mechanical error in the transfer of the case within the firm, which caused the case to be placed in the files without the normal periodic review.

Upon discovery that the file had been inactive your affiant immediately attempted re-service of the summons and complaint upon the defendant ATLANTIC SHIPPING COMPANY, S.A. and immediately contacted the defendant EGON OLDENDORFF to request their voluntary appearance or alternatively to inquire as to the possibility of an amicable settlement. Upon the unsuccessful attempt to effect service on ATLANTIC and upon the advices of EGON OLDENDORFF that they would not appear or settle this matter until proper service was effected upon them, your affiant prepared a motion for change of venue to the Southern District of South Carolina, the port of discharge, so that service could be effected upon both defendants by use of the "long arm" statute of South Carolina. This ex parte motion was made on June 29, 1973. On September 19, 1973 Judge Metzner, with a written opinion, denied the motion to transfer.

The motion papers were drafted with a view that a motion of this type was of a relatively standard nature and particularly since motions of this type have been granted by this court at the request of our office on other similar

*Affidavit of Robert J. Ryniker in Support of Plaintiff's Motion Under Rule 60(b)*

occasions, the affidavit and supporting memorandum did not go into lengthy details with respect to the fact that the owner was aware of this matter since its inception and that other further attempts to serve the charterer ATLANTIC have been undertaken.

Upon learning of the decision of Judge Metzner your affiant communicated with counsel in Savannah, Georgia, who incidentally had prepared for the transfer of this action to that forum and learned that within local procedure a new action might lie despite the fact that the court would not permit a transfer of the New York action. With the consent of our client, Savannah counsel instituted a new action and served both defendants, ATLANTIC by their agent and OLDENDORFF by substituted service. (See Exhibit I annexed to affidavit of CASPAR F. EWIG). Service on OLDENDORFF was perfected by the Secretary of State of South Carolina on <sup>or about</sup> November 15, 1973. The case was removed to the Federal Court from the State Court and motions to dismiss were made by ATLANTIC. OLDENDORFF did not appear. On or about January 10, 1974 Savannah counsel informed your affiant that the court had entered an order of dismissal in the Savannah action in that the action was untimely. Savannah counsel, however, felt that a valid toll of the statute of limitations might be argued from the fact that the New York action had been instituted within the statute of limitations. He made application to the Court and the

*Affidavit of Robert J. Ryniker in Support of  
Plaintiff's Motion Under Rule 60(b)*

action was reopened pending briefs and argument on the issue of a possible toll. On January 24, 1974 a further conference was had before Judge Metzner in the New York action and it was reported that there was a possibility of settlement since your affiant felt that the activities in Savannah would be sufficient to cause a willingness in defendants to discuss reasonable settlement.

Except for the period when a clerical error operated to prevent it, this case has been actively prosecuted by the plaintiff although in retrospect plaintiff might have proceeded somewhat differently procedurally.

WHEREFORE, your affiant respectfully requests that the relief requested herein be granted or alternatively, that this court grant such other relief as may be just in the circumstances.

---

ROBERT J. RYNIKER

Sworn to before me this  
8th day of April, 1974.

---

CATHERINE FARRAGHER  
Notary Public, State of New York  
No. 41-6237015  
Qualified in Queens County  
Certificate filed in New York County  
Commissioned January 30, 1970

AFFIDAVIT OF LE ROY S. CORSA IN OPPOSITION TO  
PLAINTIFF'S MOTION UNDER RULE 60(b)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

..... x

HUGO STINNES STEEL AND METALS COMPANY :  
(Division of Hugo Stinnes Corporation), :  
Plaintiff, : AFFIDAVIT  
-against- : 71 Civ.  
S.S. ELBE OLDENDORFF, her engines, : 5692  
boilers, etc., EGON OLDENDORFF, and :  
ATLANTIC SHIPPING COMPANY, S.A., :  
Defendants. :  
..... x

STATE OF NEW YORK ) : ss.:  
COUNTY OF NEW YORK)

LeROY S. CORSA, Esq., being duly sworn, deposes  
and says:

1. That I am an attorney-at-law and a member of the firm of Haight, Gardner, Poor & Havens, and makes this affidavit in response to the Notice of Motion and affidavits submitted by plaintiff's attorneys to set aside the final judgment of this Court dated March 25, 1974.

*Affidavit of LeRoy S. Corsa in Opposition to  
Plaintiff's Motion Under Rule 60(b)*

2. It is respectfully submitted that the affidavits of plaintiff's counsel in support of this Motion are inaccurate in many materials respects, especially insofar as they relate to conversations and "agreements" with your deponent.

3. I first became aware of this case on or about September 20, 1973, immediately following the filing of Judge Metzner's opinion dated September 19, 1973, denying plaintiff's Motion to transfer the case to Savannah. (This firm routinely obtains copies of relevant maritime decisions filed in this Court.)

4. Thereafter, on February 21, 1974, I received a telephone call from my client to discuss the fact that a threat to enter a default judgment had been made in this case and to request my assistance. Recalling Judge Metzner's statement,

" \* \* \* Although nearly two years have gone by, no one has been served. \* \* \* ",

I obtained a copy of the Notice of Motion dated June 27, 1973, as well as the affidavit of Robert J. Ryniker dated June 29, 1973.

5. In the Notice of Motion to transfer this case to Savannah and in the affidavit of Mr. Ryniker dated June 29, 1973, it is stated:

" \* \* \* Plaintiff has been unable to secure service of

*Affidavit of LeRoy S. Corsa in Opposition to  
Plaintiff's Motion Under Rule 60(b)*

process over either defendant in personam since plaintiff has been unable to locate an office or place of business within this district. Service on Atlantic was made under protest on an alleged agent but returned since the agency had terminated."

(Emphasis Added).

Based on these facts, as well as my personal knowledge that Kersten Shipping Agency has not been the agent for Atlantic Shipping for many years, I called Mr. Ryniker on February 22, 1974, to quash the threat of any default judgment against Atlantic Shipping. I questioned Mr. Ryniker as to how he was going to enter a default judgment in light of his sworn statement and acceptance of the fact that there was no proper service. Further, I told Mr. Ryniker that I would immediately have to take up the Court's time and set aside the obvious and admittedly defective service of process. At the termination of the telephone call, I had Mr. Ryniker's assurances that no judgment by default would be attempted to be taken.

6. This case involves alleged damage to goods caused by salt water. Atlantic Shipping, as Charterer, would not be liable for damage by salt water and the responsibility would be that of the Owner of the vessel, Egon Oldendorff. In this view, Mr. Ryniker suggested that if Atlantic Shipping were to appear in the New York action, plaintiff

*Affidavit of LeRoy S. Corsa in Opposition to  
Plaintiff's Motion Under Rule 60(b)*

would renew the Motion to transfer the case to Savannah where, owner Egon Oldendorff could be served. I would not go along with this scheme because, inter alia, I had no documentation to show that the alleged damage was caused by salt water and, hence, owner's responsibility. Furthermore, I saw no reason for charterer (Atlantic) to voluntarily submit to defense of a claim without a proper party before the Court. Mr. Ryniker stated the owner would be served by use of the long arm and once Egon Oldendorff appeared the claim against Atlantic Shipping would be dropped.

7. On March 20, 1974, I received documents regarding the alleged salt water damage and I was advised that this matter would be called for Pre-Trial Conference on March 25, 1974. I agreed to attend the conference but solely as an observer and with the clear understanding that my client, Atlantic Shipping would agree to nothing which would cause it to have to defend a case where they had no ultimate responsibility. It was plaintiff who permitted the case to remain stale so that there was now difficulty in obtaining proper jurisdiction over the Egon Oldendorff.

8. As the Court's notes most likely confirm, at the conference on March 25, 1974, plaintiff's counsel first requested the Court to reconsider the motion to transfer the suit to Savannah. This was denied. Plain-

*Affidavit of LeRoy S. Corsa in Opposition to Plaintiff's Motion Under Rule 60(b)*

tiff's counsel then, to your deponent's surprise in view of the concessions and agreement of Mr. Ryniker, requested the Court to enter a default against Atlantic Shipping. At this point, your deponent spoke for the only time to remind the Court that plaintiff's counsel had previously conceded that there was no jurisdiction over Atlantic Shipping. (This fact was previously cited by this Court's opinion dated September 19, 1973, as well as Chief Judge Lawrence's opinion dated March 14, 1974). The oral application to enter a default judgment against a party not before the Court was properly denied.

9. This dismissal of this suit cannot be attacked. Plaintiff knew since January 7, 1972, that Kersten Shipping Agency, Inc., was not Atlantic Shipping Company's actual agent, in spite of their name not being removed from the back side of the bill of lading. Further, on March 22, 1972, Kersten wrote plaintiff's counsel that Kersten had not been an agent "for several years". Plaintiff's counsel was told to take up the matter with the general agents in Houston. Did plaintiff attempt to contact the agent in Houston? Did plaintiff try any other means to effect service over Atlantic? The answer is obvious, plaintiff decided to transfer the case to Savannah. When this was denied, did plaintiff make any attempts to obtain jurisdiction over Atlantic? No. To

*Affidavit of LeRoy S. Corsa in Opposition to  
Plaintiff's Motion Under Rule 60(b)*

circumvent this Court's Order, a suit was filed in the State Court of Georgia. After Chief Judge Lawrence's First Order to Dismissal dated January 10, 1974, plaintiff threatened to take a default judgment against Atlantic in the New York action. Now that all has failed, "mistake, inadvertence and excusable neglect" is set forth as grounds to let this case remain on the Court docket still without service over any of the defendants.

/s/ LeRoy S. Corsa  
LeRoy S. Corsa

Sworn to before me this  
15th day of April, 1974.

Notary Public

MARGUERITE F. ZAMBITO  
Notary Public, State of New York  
#111-1111  
Qualified in Westchester County  
Cert. filed with New York Co. Clerk  
Term Expires March 30, 1976

REPLY AFFIDAVIT OF ROBERT J. RYNIKER IN SUPPORT OF  
PLAINTIFF'S MOTION UNDER RULE 60(b)

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----:  
HUGO STINNES STEEL AND METALS :  
COMPANY (Division of Hugo Stinnes  
Corporation), :  
-----:

Plaintiff, :  
-----:

REPLY AFFIDAVIT

-against- :  
-----:

71 CIV. 5692

S.S. ELBE OLDDENDORFF, her engines, :  
boilers, etc., EGON OLDEDDORFF and :  
ATLANTIC SHIPPING COMPANY, S.A. :  
-----:

Defendants. :  
-----:

STATE OF NEW YORK } SS:-  
COUNTY OF NEW YORK }

ROBERT J. RYNIKER, being duly sworn, deposes and  
says:

That I am an attorney-at-law and an associate of  
the firm of HILL, RIVKINS, CAREY, LOESBERG & O'BRIEN,  
attorneys for plaintiff herein and make this affidavit in  
reply to the affidavit of LEROY S. CORSA submitted in op-  
position to this motion. Your deponent takes no position  
with respect to the supplemental affidavit of Mr. Corsa  
since it refers to matters therein of which your deponent  
has no personal knowledge.

Your deponent would also like to point out that in  
my main affidavit I inadvertently referred to the subsequent  
action brought in the Southern District of Georgia as having

*Reply Affidavit of Robert J. Ryniker in Support of Plaintiff's Motion Under Rule 60(b)*

been brought in South Carolina and I apologize for any confusion this may have caused.

With respect to Mr. Corsa's statement that I agreed to forego the entry of the entry of the default or the attempt to enter the default in our telephone conversation of February 22, 1974, this is quite correct and I refer to the affidavit of CASPAR F. EWIG, ESQ., who attended before the court on March 25, 1974 on an of counsel basis in view of his past familiarity with the origins and initial stages of the case wherein Mr. Ewig fully discusses the issue of possible grounds for the entry of the default judgment or the result of agreeing to defer such entry or attempt that entry.

With respect to Mr. Corsa's statements and citation of my affidavit in support of the change of venue motion, my affidavit at that time was based upon a belief that Kersten Shipping Agency's assertions of terminated agency were in fact correct. Subsequently, based upon further discussions with other counsel and investigation of the possibility of arguing an agency by estoppel theory, I concluded that a viable argument to support the entry of the default judgment might be based upon such an agency theory. The statement in my affidavit in support of the venue motion was in fact correct that Kersten had been served under protest. Your deponent submits that the statements of facts in the affidavit was correct and is not inconsistent

*Reply Affidavit of Robert J. Ryniker in Support of  
Plaintiff's Motion Under Rule 60(b)*

with an argument of proper service based upon agency by estoppel.

WHEREFORE, your deponent respectfully requests that the relief requested in the main motion papers be granted and for such other and further relief as to this court may seem just in the circumstances.

15/  
ROBERT J. RYNIKER

Sworn to before me this  
17th day of April, 1974.

15/  
CATHERINE PARRAGHER  
Notary Public, State of New York  
No. 41-6237015  
Qualified in Queens County  
Certificate Filed in New York City, 1971  
Commission Expires March, 1974

SUPPLEMENTAL AFFIDAVIT OF LE ROY S. CORSA IN OPPOSITION  
PLAINTIFF'S MOTION UNDER RULE 60(b)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----- -x  
HUGO STINNES STEEL AND METALS :  
COMPANY (Division of Hugo Stinnes :  
Corporation), :Plaintiff, : SUPPLEMENTAL  
-against- : AFFIDAVITS.S. ELBE OLDENDORFF, her engines, : 71 CIV. 5692  
boilers, etc., ECON OLDENDORFF, and : (CMM)  
ATLANTIC SHIPPING COMPANY, S.A., :

Defendants. :

----- -x  
STATE OF NEW YORK )  
: ss.:  
COUNTY OF NEW YORK )

LeROY S. CORSA, Esq., being duly sworn, deposes  
and says:

This affidavit supplements my affidavit dated  
April 15, 1974. The information contained herein could not  
be supplied until the records of a closed case were examined.

In Mr. Ewig's affidavit dated April 8, 1974, page  
3, it is stated:

"In fact, on or about April 20, 1972  
your deponent caused the Marshal to  
serve Atlantic through its agent  
Kersten in a case bearing Index No.  
72 Civ. 1647-H.R.T."

(emphasis added)

Mr. Ewig is completely in error in making such statement.  
I have now examined both the Court's Docket Sheet and the

*Supplemental Affidavit of LeRoy S. Corsa in Opposition  
to Plaintiff's Motion Under Rule 60(b)*

Marshal's return regarding case 72 Civ. 1647. The party named by Mr. Ewig to serve was:

"Atlantic Shipping Company S.A.,  
c/o Staces Shipping Agency, Inc.,  
912 World Trade Building, Houston,  
Texas."

(emphasis added)

It appears clear that Mr. Ewig knew in April 1972, that Korsten was not, in fact, the agent for Atlantic. This is exactly contrary to the position now taken on the instant motion.

s/ LeRoy S. Corsa  
LeRoy S. Corsa

Sworn to before me this  
17th day of April, 1974.

\_\_\_\_\_  
Notary Public

STATE OF NEW YORK  
NOTARY PUBLIC  
EXPIRES APRIL 1975  
NOTARY PUBLIC  
EXPIRES APRIL 1975

REPLY AFFIDAVIT OF CASPAR F. EWIG IN SUPPORT OF  
PLAINTIFF'S MOTION UNDER RULE 60(b)UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X

HUGO STINNES STEEL AND METALS  
COMPANY (Division of Hugo Stinnes  
Corporation),

71 Civ. 5692

Plaintiff,

-against-

REPLY AFFIDAVITS.S. ELBE OLDEDORFF, her engines,  
boilers, etc., EGON OLDEDORFF, and  
ATLANTIC SHIPPING COMPANY, S.A.,

CMM

Defendants

APR 15 1974  
N.Y.  
SOUTHERN DISTRICT COURT

CASPAR F. EWIG, being duly sworn, deposes and says:

I make this affidavit in reply to the affidavit of LeRoy S. Corsa, Esq., in answer to plaintiff's motion to be relieved of dismissal for lack of prosecution entered on March 26, 1974.

Your deponent most respectfully apologizes to the Court and counsel for his grievous and unpardonable reliance upon his obviously faulty memory in stating that service upon Atlantic Shipping Company, S.A. in the S.S. JAIME MAIA (72 Civ. 1647-HRT) was made through Kersten Shipping Company, S.A.

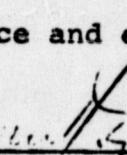
A review of deponent's files in the action involving the S.S. JAIME MAIA confirms Mr. Corsa's statement that deponent "was in error in making such a statement." Although deponent's error is inexcusable, deponent would like all concern-

*Reply Affidavit of Caspar F. Ewig in Support of  
Plaintiff's Motion Under Rule 60(b)*

ed to know that his April 8th affidavit was dictated under the urgency of time and when deponent made that statement, he truly believed that the statement was correct.

Mr. Corsa is furthermore correct in stating that an agreement was reached between he and Mr. Ryniker, as well as your deponent, that no attempt at a default judgment would be made prior to the conference and that your deponent's oral request was only made after all attempts to have the court consider alternative dispositions had failed. A service in this action had been made against Atlantic through Kersten on January 7, 1972, which summons was forwarded to Houston by Kersten, as can be seen from their letter of March 22, 1972. Furthermore, service upon owners was made pursuant to Rule 4(i), which was received by owners on March 25, 1974, although they have not appeared in this action.

Since all parties had notice of the action and a service had been made against Atlantic Shipping Company, S.A., through Kersten, it is respectfully submitted that this claim was not stale at the time of the attempted transfer in June of 1973, and that the dismissal for lack of prosecution occurred through mistake, inadvertance and excusable neglect.

  
CASPAR F. EWIG

Sworn to before me this 18th

day of April, 1974.

  
Notary Public

## NOTICE OF APPEAL

UNITED STATES  
SOUTHERN DISTRICT OF NEW YORK

HUGO STINNES STEEL and METALS  
COMPANY (Division of Hugo Stinnes  
Corporation),

Plaintiff  
-against-

S.S. ELBE OLDENDORFF, her engines,  
boilers, etc.; EGON OLDENDORFF,  
and ATLANTIC SHIPPING COMPANY, S.A.,

Defendants

2  
LOF N.Y.  
FILED  
; 3  
SCT COURT  
Index No.  
71 CIV. 5692 C.M.M.

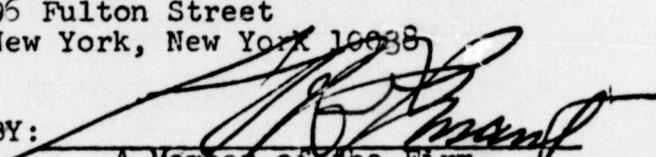
NOTICE OF APPEAL

NOTICE is hereby given that HUGO STINNES  
and METALS COMPANY, Plaintiff above-named, hereby appeals  
to the United States Court of Appeals for the Second Circuit  
from the Order dismissing the complaint and entering judg-  
ment in this action on the 26th day of March, 1974.

DATED: New York, New York  
April 25, 1974

HILL, RIVKINS, CAREY, LOESBERG &  
O'BRIEN  
Attorneys for Plaintiff  
95 Fulton Street  
New York, New York 10038

BY:

  
A Member of the Firm

TO: HAIGHT, GARDNER, POOR & HAVENS  
Attorneys for Defendant  
One State Street Plaza  
New York, New York 10004

EGON OLDENDORFF  
Funhausen  
Lubeck, West Germany

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

HUGO STINNES STEEL AND METALS  
COMPANY,

Plaintiff-Appellant,

against

S.S. ELBE OLDENDORFF, her engines,  
boilers, etc., EGON OLDENDORFF  
and ATLANTIC SHIPPING COMPANY,  
S.A.,

Defendants-Appellees.

State of New York,  
County of New York,  
City of New York—ss.:

DAVID F. WILSON, being duly sworn, deposes  
and says that he is over the age of 18 years. That on the 26th  
day of July, 1974, he served two copies of  
Joint Appendix on  
Haight, Gardner, Poor & Havens, Esqs., the attorney's  
for Defendants-Appellees  
by delivering to and leaving same with a proper person in charge of  
their office at One State Street Plaza  
in the Borough of Manhattan, City of New York, between  
the usual business hours of said day.

*David F. Wilson*

Sworn to before me this

26th day of July, 1974.

*Courtney Brown*

COURTNEY J. BROWN  
Notary Public, State of New York  
N.Y. 31-5472920  
Qualified in New York County  
Commission Expires March 30, 1976